



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 18, 1996

Ms. Lori W. Hanson
Assistant Criminal District Attorney
Civil Section
Bexar County Criminal District Attorney
300 Dolorosa, Suite 4049
San Antonio, Texas 78205

OR96-0054

Dear Ms. Hanson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 36476.

The Bexar County District Attorney's Office (the "district attorney") received an open records request for

the memorandum relating to Michael Heim which Robert F. Lipo, Jr., Assistant Criminal District Attorney of Bexar County, Texas sent during 1991 to Steven C. Hilbig, Criminal District Attorney of Bexar County, Texas, and records which are related or attached to the memorandum.

You explain that the open records request was made by an attorney acting on behalf of former County Court Judge Tony Jimenez, III, who has been sued for defamation by Michael Heim, a San Antonio police officer. You have submitted the requested memorandum¹ to this office for review. You contend this document may be withheld from the public pursuant to sections 552.103 and 552.108 of the Government Code.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a).

¹The memorandum submitted to this office had no attachments.

Open Records Decision No. 452 (1986) at 4 and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You advise this office that neither Bexar County nor the district attorney has been made a party to the lawsuit between Jimenez and Heim. Nor have you provided this office with any evidence that the county or the district attorney can reasonably anticipate becoming a party to the lawsuit at this time. Although you inform us that the district attorney "filed motions for protective orders" in connection with the lawsuit between Jimenez and Heim, you do not advise this office that the court hearing the lawsuit in fact issued the protective order. Absent a court order compelling nondisclosure of the requested memorandum, we believe that the fact that the memorandum may or may not be privileged from discovery is an entirely different issue from whether the district attorney must release the memorandum under the Open Records Act. *See* Open Records Decision No. 416 (1984). Because you have not met your burden in establishing that the memorandum relates to litigation to which the district attorney or Bexar County is a party or to which they reasonably anticipate becoming a party, you may not withhold this record pursuant to section 552.103.²

We next address your arguments under section 552.108 of the Government Code, the "law-enforcement" exception. When a governmental body claims section 552.108, the relevant question this office must address is whether the release of the requested information would undermine a legitimate interest relating to law enforcement or prosecution. Open Records Decision No. 434 (1986). Whether disclosure of particular records will unduly interfere with law enforcement must be decided on a case-by-case basis. Attorney General Opinion MW-381 (1981).

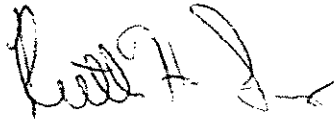
You contend that the release of the memorandum would unduly interfere with law enforcement because it would "improperly communicate strategy of the prosecutors and suggest means of impeaching prosecution witnesses to defense counsel." After reviewing the document at issue, we conclude that your contentions are without merit: this office fails to recognize, and you have not explained, how the release of this record would in any way compromise any lawful criminal investigation or prosecution or would otherwise unduly interfere with a legitimate law-enforcement interest.

²You also contend that the requested memorandum constitutes "work product." We note, however, that in the context of open records requests, the work product doctrine merely represents one aspect of section 552.103 of the Open Records Act: work product may be withheld only if it "relates" to pending or reasonably anticipated litigation to which the governmental entity is or may be a party. *See* Open Records Decision No. 574 (1990). Because you have failed to meet your burden under section 552.103, you may not withhold the memorandum under this exception as work product or otherwise.

This record does not come under the protection of section 552.108. Other than section 552.103, which is also inapplicable, you have not raised any of the act's other exceptions to required public disclosure. Accordingly, the district attorney must release the memorandum in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/RWP/rho

Ref.: ID# 36476

Enclosures: Submitted documents

cc: Mr. Carl Robin Teague
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(w/o enclosures)